COMMENTARY

The truth about litigation funding

BY MARK BELLO

Mark Bello

What is litigation funding and why has it been considered "taboo" by some?

According to Wikipedia, litigation funding is defined as "a practice in which individuals who are plaintiffs in lawsuits receive money from firms and individuals who take a lien on the proceeds of a personal injury suit in return for ready cash. It is not considered a loan as the money does not have to be repaid if the plaintiff's law suit is unsuccessful; it is nonrecourse debt. Funding companies also advance money to attorneys against anticipated legal fees earned in a personal injury matter."

Now, why would something that helps people in a time of need be considered taboo or bad for them? To answer this, we need to go back to the dawn of the 21st century when lawsuit funding was first introduced to trial lawyers across the country. When it was first introduced, many saw the benefit of using lawsuit funding as a strategic tool for their personal injury cases. This was something that enabled them to keep fighting their case and not settle for less than it was worth.

Personal injury litigation often deals with insurance companies that have all the time and money needed to (as the American Association for Justice aptly states) "Delay, Deny, Confuse and Refuse." Without the assistance of litigation funding, insurance companies are able to take full advantage of the economic disparity the plaintiff may be facing and prevent them from receiving full case value, especially, pre-trial, pre-verdict, or pre-judgment. These tactics are equally effective post verdict or judgment, as the insurance company will effectuate an often groundless appeal, which may take years to resolve, resulting in premature and under-verdict settlement negotiations. Such avoidance techniques will often result in very desperate plaintiffs accepting offers far below the value of their cases because they lack the financial resources to maintain reasonable standards of living while waiting for fair resolution.

And, there have been judges, here and there, that did not immediately embrace the idea of litigation funding. For example, in October 2001, the Ohio Court of Appeals affirmed a trial court declaratory judgment against a funding company and for a personal injury victim who had sought assistance from and entered into several contracts with the funding company. The appellate court went further than the trial court (which had ruled that the funding company was entitled to repayment of its principal with 8 percent interest) and determined that the contracts were 'loans' because, in their opinion, there was no real probability that non-payment would occur. As 'loans' the transactions were governed by a license requirement of the Small Loan Act. The owner did not have a license, as required by the Act, thus, he was guilty of 'contracting for small loans' without a license. As a result, the contracts were void and the company had no right to collect. The company appealed to the Ohio Supreme Court and, in January 2003, the Court affirmed the Court of Appeals and went even further to punish the company. The Court not only found the transactions to be 'loans,' it also determined the transactions to be champertous (an ancient, outdated, and, here, misplaced legal concept) and indicated that an 'intermeddler was not permitted to gorge upon the fruits of litigation.'

Usury, by definition, must be evaluated on a case-by-case basis. Thus, the Court of Appeals decision did not "kill" lawsuit funding. But the champerty finding applied to all cases funded by a 3rd party and did lead to the death of lawsuit funding in Ohio until recently.

The legal funding industry persisted, established its niche in the national legal community, and continued to grow in other cities and states around the country. In fact, legal finance services have become a significant, national, strategic tool, used by trial lawyers to obtain needed assistance for their clients and improved results in their litigation.

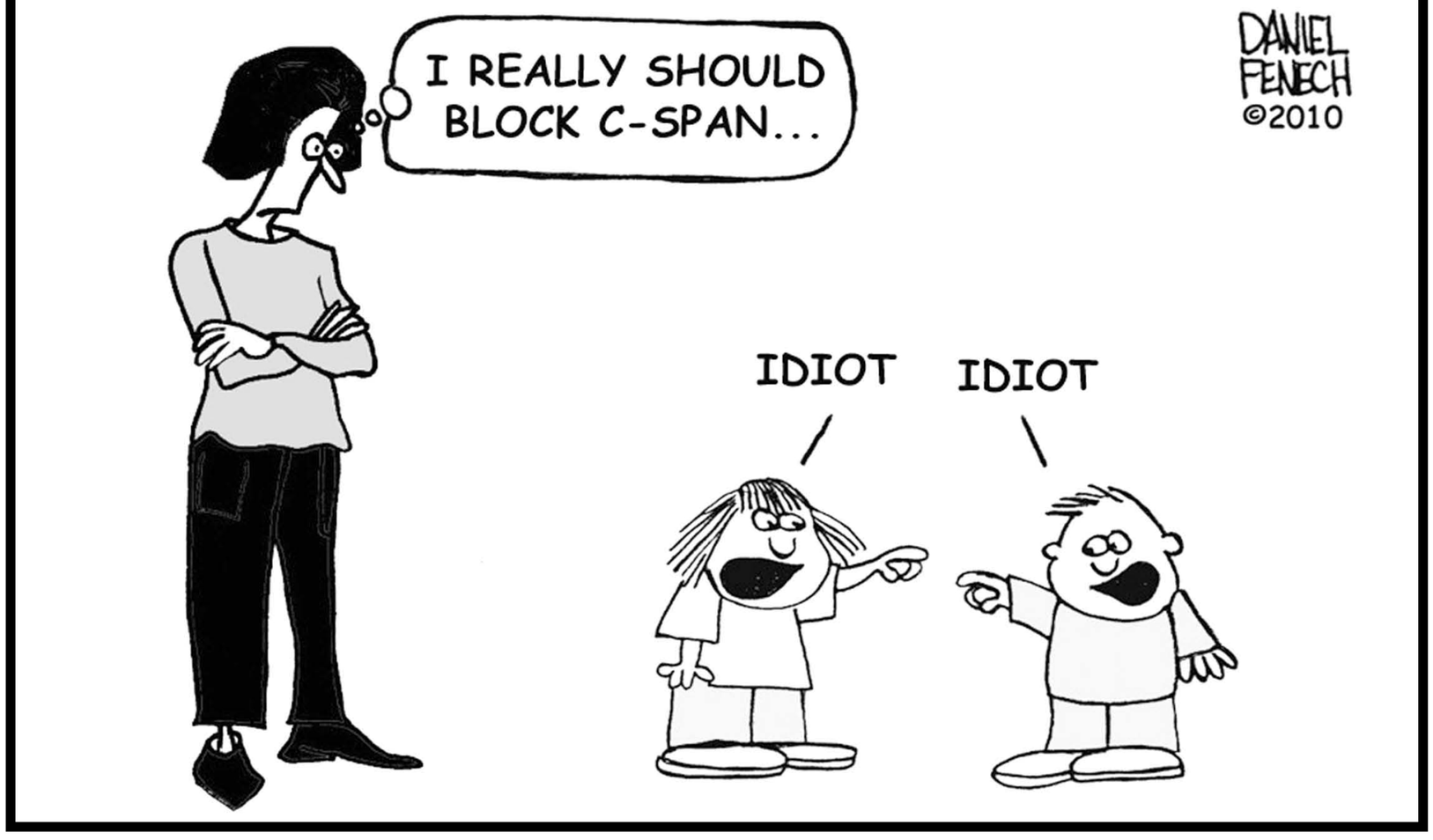
In Ohio, industry leaders, Ohio attorneys and Ohio legislators began to seek a legislative solution. With hard work and recognition that lawsuit funding can be a vital and beneficial necessity to the needy litigants, in the right circumstance, a legislative solution was reached. In the May 2008, Ohio Governor, Ted Strickland, signed legislation (former House Bill 248) effective August 27, 2008, allowing legal finance companies to operate, under regulated terms, in the state of Ohio. Ohio had been the only state to prohibit legal financing; the state joined Maine as only the second state in the country to pass reasonable regulatory legislation for the legal funding industry (New York has regulated legal funding via an Attorney General's Opinion and Florida has adopted that opinion as its standard for lawsuit finance transactions; other states 'regulate' an attorney's participation in these transactions through its ethics opinions).

Ethical lawsuit funding companies welcome well-reasoned legislation. Seriously injured or disabled Ohio citizens can now participate in a service that provides needed financial assistance to litigants who have little chance of qualifying for traditional loan products. This legislation protects consumers by providing guidelines for legal funding companies to follow when providing financial relief for plaintiffs in need; it provides the injured or disabled consumer with the vital option to use litigation funding when necessary to help pay necessary bills and expenses.

The past is the past; today, trial attorneys are now utilizing litigation funding as a valuable tool in the appropriate situation. Litigation funding is meant to be used for a serious purpose; it is not for the plaintiff to go on a shopping spree. While most legal finance companies market that the plaintiff can use a lawsuit cash advance for any reason plaintiff likes, it is wise, because lawsuit funding tends on the expensive side (after all, the obligation is excused, if the litigation fails to resolve successfully), to use this service to prevent foreclosure, car repossession, rent or groceries.

As litigation funding becomes more of a mainstream service, many inexperienced and underfunded competitors are entering the marketplace. Be careful; choose an experienced company. Ask how long the company has been in business. Ask for references. Ask whether the company is a principal or a broker and whether it is owned by financial services professionals or legal professionals. Lawsuit funding, at its best, is a strategy. An experienced legal professional, providing this service ethically and professionally, will do so in your best interest and in the best interest of your case.

Mark Bello has thirty-one years experience as a trial lawyer and ten years as an underwriter and situational analyst in the litigation funding industry. He is the owner and founder of Lawsuit Financial Corporation which helps provide cash flow solutions and consulting when necessities of life funding is needed during litigation. Bello is a member of the American Association for Justice, Sustaining and Justice Pac member of the Michigan Association for Justice, Business Associate of the Florida, Tennessee, and Colorado Associations for Justice, and a member of the State Bar of Michigan and the American Bar Associations.



EYE ON THE BLOGOSPHERE

Are younger professional women really that clueless?

BY TARYN HARTMAN
Legal News

CATFIGHT!!

That usually sends people — and in this case, hopefully eyeballs — running. But it does headline a Blogosphere story from the last few weeks that's made me want to take a closer look at legal women, how they behave and how they treat one another, and whether this is part of a vicious cycle that causes women attorneys to feel as if they're constantly fighting for the success and respect enjoyed by their male counterparts.

Let me put it out there right off the bat that I'm aware this is a sensitive issue and my perspective is going to be very different from a lot of others because I'm not an attorney. That said, I welcome any and all feedback and personal stories surrounding the experience of being a woman attorney and hope that this starts a dialogue about how these issues play out in Metro Detroit and even on a national scale.

I'm well aware that the news items that hit the blog wires are usually pretty sensational (otherwise why would anybody read them, right?) and are by no means representative of all women in legal careers, but I do think they serve as useful microcosms for examining the state of women in the profession and whether that could be influenced by changes in behavior.

Let's start with the catfight. Two weeks ago, an e-mail originally sent by third-year Harvard law student Stephanie Grace last November was forwarded to Above the Law after it had been disseminated to the Black Law Students Association at Harvard and then to chapters across the country, purportedly because Grace's words painted her as a racist.

Now, before we go any further, one thing about this story is that it has shades of the John Roberts retirement rumor we talked about here a little while ago: first the e-mail comments grew out of a dinner hosted by the generally conservative Federalist Society; then it was just three friends having dinner in the campus dining hall. Then the BLSA chapters at different schools were banding together to try to get Stephanie's federal clerkship with Alex Kozinski, chief of the 9th Circuit Court of Appeals in California, yanked; then they weren't. Above the Law founder David Lat wrote a great summary of this whole brouhaha last week that's available at http://bit.ly/drmvAQ. ATL also has the original e-mail at http://bit.ly/cxiRtk.

We all know there's no such thing as a calm and measured response when we're talking about the Blogosphere, so the scandal unfolded based on a context-free snippet of the e-mail that read, "I absolutely do not rule out the possibility that African Americans are, on average, genetically predisposed to be less intelligent," and the number of rumors surrounding it, like those about the Federalist Society and BLSA. In the full e-mail, she is fastidious about expanding on her point by citing academic studies and theories, hypothetically to make herself come across as NOT racist.

But that information wasn't taken into account before her identity was revealed by Gawker (ATL had originally redacted Grace's name from its initial post) and the law school's dean, Martha Minow, got involved and issued a statement, available at http://bit.ly/c31BVh, on April 29, two days after the e-mail hit the Web.

And then it comes out that the genesis of all this was a recent fight between Grace and her friend Yelena Shagall, prompting Shagall to dig into her inbox archives — remember, the original e-mail was sent in November — and forward Grace's potentially damaging comments to the Black Students Law Association, although Shagall denied this to both ATL and Gawker. But even worse, the fight is apparently over a boy, specifically, "Stephanie confronted [Yelena] because Yelena had slept with a mutual friend's ex-boyfriend," according to Gawker.

So now both of these successful, high-achieving and apparently intelligent (they got into Harvard Law, after all, and a read of the full text of Grace's original e-mail reveals she's pretty smart) girls' names have been dragged through the mud of a culture that thrives on making snap judgments without having all the facts in front of it, and all because of some trivial high-school fight over a dude. I hope their surely promising careers aren't ruined before they even begin, and if they in fact are, I hope it was worth it.

This story tells us several things, not only about the anatomy of a rumor but also about the intersection of technology and privacy; it only takes a mouse click for a personal e-mail sent to two of our friends to go viral, and today's teeming Blogosphere only assists in the further decimation of what we think of as private information.

But that's another story. What I find really interesting about this is that it's a clear example of the fact that girls are absolutely evil, especially to one another, and this case illustrates that it doesn't stop after seventeen. I can't help but think that if this is how two women on the cusps of their professional legal careers are treating one another, then that ethic must also carry over into law firms to some extent. Maybe one of the reasons women lawyers often struggle to succeed in what's commonly called a good-ol'-boys environment is because they're too busy stomping on each other's necks to rally together in support of one another. Maybe women just can't stand to see their female colleagues do well without feeling that they're being slighted in some way.

There's also been a lot of recent online chatter about how women lawyers should dress in the workplace such as Nicole Black's column "Appropriate Attire for Women Attorneys" available at her (one of many) blog at http://bit.ly/cAfC4B.

I first caught wind of this topic in March when ATL's Elie Mystal posted the headline, "Biglaw Women, Do You Even Know How to Use Make-Up?" (http://bit.ly/b1sSMO) about a "dressing for success" event planned exclusively for women by the City Bar of New York, an event that was cancelled the day after the post because of the outcry against it (http://bit.ly/bSLNQ9).

ATL editors Mystal and Kashmir Hill took opposing stances on the issue: male Mystal's boiled down to "Why market a 'fashion sense talk' to women, while ignoring men? Why just assume that women, professional women, need be more concerned about their appearance than their male counterparts? We all know why. It's because there is a huge double standard when it comes to the appearance expectations on women as opposed to men. I recognize that, but slathering makeup all over the problem doesn't make it any prettier."

The following day, Hill—a woman—countered with, "There are certain female issues—when it comes to dress and make-up—that men cannot relate to, so it does not strike me as outrageous that women would have their own event on these issues."

Then the Chicago Bar Association went ahead and held a fashion show for lawyers last month, which was covered by some local bloggers for ATL and then got picked up on Jezebel, which has since started its own "Dress Code" series, including a missive on appropriate work attire (http://bit.ly/c9Yyaz).

Granted, the coverage of the event posted to ATL (http://bit.ly/ccG8Z2) by bloggers Legally Fabulous (http://legally-fabulous.blogspot.com/) and Attractive Nuisance was pretty tongue-in-cheek due to their predetermined absurdity of the event, but some good/totally insane points about how women should dress came to light.

Attractive Nuisance, whose blog link is no longer functioning, noted that some of the very vague suggestions doled out included "wear flats, wear minimal jewelry, wear minimal makeup, do not wear hair in a pony-tail, do not wear hair down in a distracting way, wear pantyhose, do not wear open-toe shoes, do not wear peep-toe shoes, and do not wear dark nail polish," specifically, for whatever reason, burgundy.

And also, "wear a shirt under your suit that is not too tight, not low-cut, not bright colored, not patterned, not ruffle-y, and not too feminine." And "never wear boots, never show your arms, NEVER wear pink, never wear clothes that reveal your body shape, never wear clothes that reveal your tramp stamp, and never dress like a 'sleazy girl' which apparently means wearing a fitted pencil skirt and side ponytail."

But my absolute favorite, which is in bold type on the ATL post and helps prove my earlier hypothesis, is "Oh, and do not wear your engagement ring if it is large because it may anger your women interviewers and cause jealousy (and perhaps rage)." It's apparently impossible for women to be objective towards other women (in an interview setting, for example) without our biological need to rip our co-gender competitors to shreds getting in the way. Seriously? Women are supposed to worry about their engagement rings making other women jealous instead of spending their time and energy thinking about what they should be SAYING?

The very fact that these kinds of seminars are out there is evi-

Taryn Hartman

dence of some problems. Sure, there's a double standard out there when it comes to how men and women should look and dress. That's not just in the law, that's in life. But that bar associations and other organizations feel they need to be holding them doesn't come from their discipleship of Tim Gunn alone. It's because there are women out there who are dressing in ways that necessitate them. Just last weekend a local lawyer told me about a receptionist she'd interviewed and started on a trial period who came in the very next day wearing a too-tight, midriff-baring ensemble with no sense whatsoever of its impropriety.

I'm typing this while sitting Indian-style in my desk chair, wearing distressed jeans, a gray football t-shirt and moccasins with no socks (my shoes are currently on the floor), so I'm not going to be the one doling out dressing-downs to non-wardrobe-savvy women. But my question remains: Why do women open the doors to this kind of criticism when it comes to presenting ourselves? Why is it apparently so difficult for us to figure out what constitutes office-appropriate attire and, for that matter, behavior? Are these conflicts more generational than gender-based? Or is it demeaning and trivial to even be talking about how women dress in the first place? I'm really looking forward to hearing your thoughts and reactions.

COMMENTARY PAGE

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